

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| CIGAR MASTERS PROVIDENCE, INC., | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | C.A. No. 16-471S |
| | : | |
| OMNI RHODE ISLAND, LLC, | : | |
| Defendant. | : | |

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

In this dispute over the Lease between a landlord, Defendant Omni Rhode Island, Inc., and a tenant, Plaintiff Cigar Masters Providence, Inc., Cigar Masters has asked the Court to enter summary judgment in its favor on the allegation in Omni's counterclaim that Cigar Masters failed to pay the portion of the rent known as the "Percentage Rental," which is required by Section 2.2 of the Lease. In reliance on Fed. R. Civ. P. 56(d), Omni objects, arguing that the motion is premature in that Cigar Masters has refused to respond to the interrogatories and document requests it propounded pertaining to this claim so that it cannot present facts essential to justify its opposition. Because the parties agreed to focus their efforts on Omni's now under-advisement motion for preliminary injunction, Omni has not yet sought to overcome Cigar Masters' objections to the discovery requests.

The Lease between the parties required Cigar Masters to pay a monthly base amount of "Minimal Rental." ECF No. 32-1 at 7 (§1.1(j)), at 8 (§ 2.1), at 28 (Ex. C). To the extent that Cigar Masters' total gross sales, as defined in the Lease, exceeded a set "gross sales breakpoint," Cigar Masters would owe additional rent, called the "Percentage Rental." ECF No. 32-1 at 7 (§1.1(k)), at 8 (§ 2.2), at 28 (Ex. C). In connection with the calculation of the Percentage Rental, the Lease required Cigar Masters to prepare and provide to Omni monthly and annual statements

of gross sales, within a fixed period of time following the close of the period to which the statement pertained. ECF No. 32-1 at 9 (§2.2b)). The annual statement was required to be “certified to be correct by an officer of [Cigar Masters].” Id. If Cigar Masters complied with its obligation to provide the statements, Omni was contractually foreclosed from questioning whether there was an underpayment of the Percentage Rental unless it exercised its right to audit the accuracy of the annual statement within one year after receipt of it from Cigar Masters. ECF No. 32-1 at 9 (§ 2.2(c)).

Cigar Masters’ presentation in support of the motion for summary judgment appears to establish that it failed to comply with the requirement to provide these statements, particularly the requirement to supply certified annual statements. Rather, it has presented documents that prove only that it periodically provided uncertified information about its sales in response to requests from Omni. ECF No. 43-1 at 14-18. Moreover, its current manager, Jack Dakermanji, testified that he was unaware of both the requirement to pay Percentage Rental or the requirement to provide monthly and certified annual statements of gross sales. ECF No. 41-7 at 6-8.

Cigar Masters’ motion is based on a fact that it alleges is not disputed – that its gross sales never hit the breakpoint level that would have triggered the obligation to pay the Percentage Rental. In support of this proposition it relies on the Affidavit of Mr. Dakermanji, who avers that Cigar Masters’ gross sales never reached any of the relevant breakpoints; Mr. Dakermanji also swears to his belief that Omni “knew” that Cigar Masters’ sales were too low to trigger the Percentage Rental requirement. ECF No. 32-1 at 3-4 (¶¶ 13, 17). Apart from Mr. Dakermanji’s belief, the record before the Court contains no evidence that Omni knew that Cigar Masters’ sales were consistently too low to require it to pay Percentage Rental.

Omni's counterclaim alleges that Cigar Masters breached its obligation to pay the Percentage Rental and it has propounded interrogatories and document requests requiring Cigar Masters to produce evidence of its gross sales so that it can prove its claim. Cigar Masters objected to this discovery based on Section 2.2(c) of the Lease, which it argues forecloses Omni from questioning the amount of the gross sales after one year. The problem is that the record establishes that Cigar Masters seemingly did not ever comply with its obligation to provide a certified annual statement, which appears to be the condition precedent to the foreclosure argument on which Cigar Masters now relies. Moreover, the Lease specifically provides that neither party waives any contractual rights by the failure to exercise such rights or by a custom or practice at variance with the terms. ECF No. 32-1 at 21 (§ 19.7). Thus, Omni appears to be legally free to contest the gross sales information in the Dakermanji Affidavit, yet lacks the ability to do so because it has been blocked by Cigar Masters' objections. Further, Omni has not moved to compel based on the parties' agreement to focus on expedited discovery in connection with the preliminary injection motion; such a motion to compel would have been a breach of that agreement.

Based on the foregoing, pursuant to Fed. R. Civ. P. 56(d), I find that this motion is premature. Further, it is impossible for the Court (or the parties) to quantify what discovery may be sufficient,¹ so that it would be inappropriate to defer the decision of the motion for a fixed period or for the completion of specific discovery. Moreover, underlying the motion is Cigar Masters' thus-far *ipse dixit* claim that Omni "knew" that Cigar Masters' sales volume was

¹ For example, the production of certified financial statements for each of the years in issue could resolve the matter. However, it is unknown whether Cigar Masters maintains such statements for its Providence store; therefore, testimony may be required to explain whatever records are available. Or Cigar Masters may be able to prove its allegation that Omni "knew" through other documents or testimony or the use of discovery tools such as requests to admit. In short, the discovery required to bring this issue to the point where it is clear that the material facts are undisputed may simply be a matter of serving responses to the pending discovery or much more may be required.

consistently below the level needed for Percentage Rental to be due and owing; this allegation raises the possibility that discovery could lead to the dropping of the claim for Percentage Rental or could result in a Fed. R. Civ. P. 11 challenge to paragraph 65 of the Counterclaim. These complications are all reasons why the Court should not defer decision, but should deny the motion now, without prejudice to Cigar Masters' right to assert it again, on a more developed factual record.

Based on the foregoing, including the finding that Omni has presented by affidavit a specified reason why it is not yet able to marshal the facts required to oppose the motion, I recommend that the Court deny the motion for summary judgment (ECF No. 32) without prejudice pursuant to Fed. R. Civ. P. 56(d)(1). Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
May 26, 2017